Filed 6/30/09 P. v. Alaniz CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HUMBERTO HUIZAR ALANIZ, Defendant and Appellant.	E045571 (Super.Ct.No. INF045574) OPINION

APPEAL from the Superior Court of Riverside County. Phrasel L. Shelton, Judge. (Retired judge of the San Mateo Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed.

Lynelle K. Hee, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and Raymond M. DiGuiseppe, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

A jury convicted defendant Humberto Huizar Alaniz of one count of committing a lewd and lascivious act, including substantial sexual conduct, on C.H., a child under the age of 14 years. (Pen. Code, §§ 288, subd. (a), and 1203.66, subd. (a).) The court sentenced defendant to the middle term of six years in prison.

Defendant claims the court erred by allowing evidence of prior acts under Evidence Code sections 1101 and 1108[1] and by admitting the victim's videotaped interview. We reject these claims and affirm the judgment.

2. Facts

a. Prosecution's Evidence

Defendant is the victim's uncle by marriage to her maternal aunt, M.A. C.H. was born in November 1994 and she was 12 years old when she testified. In May 2003, when she was eight years old, she was living with her mother, B.Q., in a duplex in Cathedral City. Another uncle, B.Q.'s brother O.Q., and his family shared the duplex. Defendant also lived in Cathedral City. Defendant sometimes picked up the victim and his son from school and brought them to his house.

C.H. testified about numerous episodes occurring before the charged offense. When the victim was seven years old, defendant made her touch his penis. He touched

[1] All statutory references are to the Evidence Code unless stated otherwise.

her genitals[2] with his hand in his bedroom. The victim felt uncomfortable but she did not tell anyone what had happened. Over a period of time, defendant repeated the touching about seven times. He would force her hand to stroke his penis. He also asked her to give his penis "a little besito," meaning "kiss" in Spanish. One time, after she had been swimming at his house, he took her into the guest bedroom and asked her to "scratch him in his private part." She continued not to tell anyone about what was happening because she was scared.

In May 2003, when the victim was eight years old, defendant had taken her home to get her swimsuit. While they sat on the couch, he compelled her to engage in mutual masturbation.

A few days later, the victim told her cousin, D.Q., about what had occurred. D.Q. told her father, O.Q., who told B.Q., who then called the police. C.H. was interviewed by Child Protective Services.

C.H. also accused her mother's friend, Chon., of touching her but differently than defendant.

B.Q. testified that defendant had molested her twice when she was 14 years old. One incident occurred while he was driving and he asked her to hold his penis while he urinated into a bottle. On another occasion, she was babysitting for him and spent the

[2] Although the victim used the word "vagina" she described the touching as occurring under her clothes but not involving penetration. Since the vagina is an internal organ, the victim may have misused "vagina" to describe her genitals although we recognize that, at the time of her videotaped interview, she described touching that did involve penetration.

night. While she slept, he touched her "vagina" while pretending to cover her with a blanket. On cross-examination, B.Q. testified the police report incorrectly described three incidents rather than two. She admitted to giving a false name to the police during a traffic stop and to a shoplifting incident when she was 19 and 20.

B.Q. and M.A.'s sister, Maria, testified that she lived with M.A. and defendant for about a year when she was 18. Once defendant came into a bedroom where she was sleeping and touched her leg. When she objected, he stopped and told her to calm down. She moved out two days later.

A.G., a friend of defendant and M.A., testified that she once spent the night at their house and defendant tried to get in bed with her. She did not recall having told police defendant had fondled his erect penis, rubbed her, or reached for her genitals.

Steven Williams, an investigator for the district attorney's office, interviewed A.G. She told him defendant touched his erect penis, put his hand on her stomach, and moved it toward her genitals.

b. Defense Evidence

D.A., defendant's daughter, testified she used to babysit C.H. When defendant picked up his son and C.H. from school, he dropped them off with D.A. before leaving for work as a chef at 2:30 p.m. to start preparation. C.H. was affectionate toward defendant. Once B.Q. called D.A. and said, because C.H. had accused D.A. of hurting her, D.A. could not watch C.H. any more. But later B.Q. asked D.A. to watch her again. In D.A.'s opinion, C.H. was a liar. D.A. also claimed B.Q. had attacked her at a concert, kicking, scratching, and pulling her hair. A friend of D.A.'s offered similar testimony.

Defense counsel argued and the jury was instructed that, in an earlier trial, defendant had been acquitted of a sexual crime committed before May 2003.

3. Sections 1101 and 1108 Evidence

Three women testified about defendant's past sexual misconduct: his sisters-in-law, B.Q. and Maria; and his friend, A.G. In the previous trial, A.G. had testified that, in 1996, when she spent the night at defendant's house, he came into the bedroom and rubbed his erect penis and touched her arm. Maria had previously testified that, when she was 18, defendant had rubbed himself against her when she was sleeping and rubbed her stomach and thigh.

Defendant contends it was error to admit the testimony of Maria and A.G. because the dissimilar incidents involved adult women, not a child like the victim. Defendant argues the evidence was more prejudicial than probative and was improperly used to prove a criminal disposition. The People counter the evidence was admissible to show defendant's propensity to commit sexual offenses and, furthermore, it was probative of intent. Additionally, any error was harmless. In our view, even if it was not inadmissible under section 1101, the subject evidence was admissible under section 1108 and was not made inadmissible under section 352.

As a general rule, evidence of defendant's conduct is not admissible to show disposition or propensity but is admissible to prove identity, plan, intent, knowledge, or opportunity. (§ 1101; *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Section 1108 provides a statutory exception, allowing propensity evidence to be admitted in sex offense cases to show a defendant is more likely to have committed the charged offense.

(*People v. Falsetta* (1999) 21 Cal.4th 903, 910; *People v. Abilez* (2007) 41 Cal.4th 472, 502.) Therefore, if the uncharged conduct is a sex offense, it is admissible subject to section 352. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1315; *People v. Branch* (2001) 91 Cal.App.4th 274, 281.)

The evidence in the present case involves two previous sex offenses. As such, it is admissible under section 1108 without regard to section 1101. In *Branch*, the court deemed the evidence of prior sexual misconduct admissible under both sections 1101 and 1108. (*People v. Branch, supra,* 91 Cal.App.4th at pp. 280-281.) But, even if evidence is not admissible under section 1101, it can still be admissible under section 1108: ". . . section 1108 'explicitly supersedes' section 1101's prohibition of evidence of character or disposition." (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Once we "conclude[] that the court did not err in admitting the evidence under section 1108, we need not and do not address the issue of whether that evidence was also admissible under section 1101, subdivision (b) as evidence pertaining to [defendant's] 'intent.'" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 372.)

Instead, we proceed to analyze whether the subject evidence should have been excluded under section 352. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404; *People v. Branch, supra,* 91 Cal.App.4th at p. 281.) The trial court weighs the probative value against the potential risk of prejudice, confusion, and undue presumption of time. (*People v. Crabtree, supra,* 169 Cal.App.4th at pp. 1314-1315; *Branch, supra,* at pp. 283-286.) We review the trial court's ruling for an abuse of discretion. (*Crabtree, supra,* at p. 1314; *Branch, supra,* at p. 282.)

As has already been acknowledged, the propensity evidence is highly probative. (*People v. Branch, supra,* 91 Cal.App.4th at pp. 282-283.) In each instance, defendant's conduct was more similar than not because defendant chose his victims from among family members and friends and approached them in residences using a characteristic style that was personally invasive and persistent. Although his two other victims were adults, B.Q. was a minor like C.H. when defendant made overtures toward her. Taken altogether, the evidence of defendant's conduct demonstrated a significant consistency that offset any argument about remoteness. (*People v. Branch, supra,* 91 Cal.App.4th at p. 285, citing *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395; *People v. Ewoldt, supra,* 7 Cal.4th at p. 402, citing *People v. Robbins* (1988) 45 Cal.3d 867, 879.) The record also did not reveal any undue consumption of time by the subject evidence or any reason for the jury to be confused by the relatively brief testimony of Maria and A.G.

Furthermore, even if the trial court erred, in view of the substantial independent evidence, which is unchallenged by defendant, it was harmless error under any standard. (*People v. Samuels* (2005) 36 Cal.4th 96, 113-114.)

4. Videotaped Interview

The second challenge made by defendant on appeal is whether all or portions of the videotaped interview of C.H. should have been admitted as prior consistent or inconsistent statements. The gist of defendant's argument is that the interview was not inconsistent with C.H.'s trial testimony except for two instances and that the details about other offenses against C.H. were too inflammatory. The People counter that all of the

material in the recorded interview was admissible as either prior consistent or inconsistent statements.

Some of the material was admissible as prior consistent statements about other sexual offenses which were admissible under section 1108. In particular, the prior consistent statements served to refute the express or implied charge that C.H.'s trial testimony was based upon a recent fabrication, bias, or motive. (§§ 791 and 1236; *People v. Kennedy* (2005) 36 Cal.4th 595, 614; *People v. Jones* (2003) 30 Cal.4th 1084, 1106-1107; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1014-1015; *People v. Volk* (1963) 221 Cal.App.2d 291, 296.) While cross-examining C.H., defense counsel implied or charged that C.H. had exaggerated or altered her story about defendant's conduct and contradicted her testimony from an earlier trial. Therefore, it was highly appropriate for the prosecution to use C.H.'s interview to rehabilitate her. (§ 791; *Kennedy, supra,* at p. 614; *Volk, supra,* at p. 296.)

The prior inconsistent statements contained in the interview were also admissible. In particular, there was a difference between the interview and C.H.'s trial testimony about whether defendant penetrated the vagina and/or touched the genitals. Her prior inconsistent statement was admissible subject to her being allowed to explain or deny the statement. (§§ 770 and 1235; *In re Miranda* (2008) 43 Cal.4th 541, 577; *People v. Avila* (2006) 38 Cal.4th 491, 579-580; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1597.)

Because most of the material in the interview was consistent with C.H.'s trial testimony, it could hardly be considered "inflammatory." What was inconsistent actually favored defendant by making his conduct seem better rather than worse. The jury was

also informed that defendant had been previously acquitted of a sexual offense predating May 2003. Therefore, admission of the videotaped interview was not a prejudicial abuse of discretion. (*People v. Avila*, *supra*, 38 Cal.4th at p. 579; *People v. Johnson* (1992) 3 Cal.4th 1183, 1219; *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.)

5. Disposition

We affirm the judgment.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.